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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-6742

FELIPE JUAREZ HURTADO, RAMON AVILA HURTADO, VICTOR GAUCIN LAZALDE, and JORGE (SERGIO) MIRANDA GAUCIN LAZALDE, Individually and as Members of a Class,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the United States District Court for the Western District of Texas, El Paso Division, in this cause is reported at 452 F.2d 951. Said opinion was delivered on December 21, 1971.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit in this cause was entered on December 21, 1971. A petition for rehearing was denied on March 1, 1972. Petition for Writ of Certiorari was docketed in this Court on May 30, 1972. The jurisdiction of the Court is invoked under 28 U.S.C. section 1254 (1).

STATUTES INVOLVED

Rule 46 (b) of the Federal Rules of Criminal Procedure reads as follows:

"(b) *Bail for Witness.* If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that it may become impracticable to secure his presence by subpoena, the court or commissioner may require him to give bail for his appearance as a witness, in an amount fixed by the court or commissioner. If the person fails to give bail the court or commissioner may commit him to the custody of the marshal pending final disposition of the proceeding in which the testimony is needed, may order his release if he has been detained for an unreasonable length of time and may modify at any time the requirement as to bail."

Title 28 U.S.C. section 1821 reads as follows:

"§*1821. Per Diem and Mileage Generally; Subsistence.*

A witness attending in any court of the United States, or before a United States Commissioner, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall receive $20 for each day's

attendance and for the time necessarily occupied in going to and returning from the same, and 10 cents per mile for going from and returning to his place of residence. Regardless of the mode of travel employed by the witness, computation of mileage under this section shall be made on the basis of a uniform table of distances adopted by the Attorney General. Witnesses who are not salaried employees of the Government and who are not in custody and who attend at points so far removed from their respective residence as to prohibit return thereto from day to day shall be entitled to an additional allowance of $16 per day for expenses of subsistence including the time necessarily occupied in going to and returning from the place of attendance: *Provided*, That in lieu of the mileage allowance provided herein, witnesses who are required to travel between the Territories and possessions, or to and from the continental United States, shall be entitled to the actual expenses of travel at the lowest first-class rate available at the time of reservation for passage, by means of transportation employed: *Provided further*, That this section shall not apply to Alaska.

When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of $1 per day."

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States reads as follows:

"No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in

actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Thriteenth Amendment to the Constitution of the United States reads as follows:

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation."

The Fourteenth Amendment to the Constitution of the United States, Section 1, reads as follows:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

I. Whether the proper interpretation of the statute, 28 U.S.C. §1821, requires that witnesses who are incarcerated pursuant to the provisions of Rule 46 (b) F.R.Crim.P. be paid the sum of twenty-one dollars per

day for their time in jail, or the sum of only one dollar per day.

II. Whether the statute, if interpreted to require the payment of only one dollar per day to incarcerated witnesses, is repugnant to the Fifth Amendment insofar as it denies Due Process of Law by denying just compensation for deprivation of liberty, livelihood and welfare, both on its face and as applied to Petitioners.

III. Whether the statute, if interpreted to require the payment of only one dollar per day to incarcerated witnesses, is repugnant to the Fifth Amendment insofar as it denies "substantive" Due Process of Law by violating fundamental principles of justice.

IV. Whether the statute, if interpreted to require payment of only one dollar per day to incarcerated witnesses, is repugnant to the Due Process Clause of the Fifth Amendment insofar as it imposes deprivation of equal protection of the law, as guaranteed by the Fourteenth Amendment, both on its face and as applied to Petitioners.

V. Whether the statute, if interpreted to require the payment of only one dollar per day to incarcerated witnesses, is repugnant to the Thirteenth Amendment, insofar as it imposes involuntary servitude, both on its face and as applied to Petitioners.

VI. Whether Petitioners' request for the convening of a three-judge court pursuant to 28 U.S.C. §2282 was improperly denied.

STATEMENT OF THE CASE

Petitioners were incarcerated in the El Paso County Jail as material witnesses in a pending criminal prosecution pursuant to the provisions of Rule 46 (b) of

the Federal Rules of Criminal Procedure upon their inability to give bail for their appearance. Upon their release, they were paid one dollar for each day of their incarceration. Petitioners filed this action on behalf of themselves and that class of persons who had been, were, and would be in the future incarcerated as material witnesses and paid only one dollar per day for such incarceration. Petitioners asserted that the proper interpretation of 28 U.S.C. §1821 requires that the "per diem" compensation provided for in the statute is payable to incarcerated witnesses during their incarceration, such that they and the members of their class were entitled to receive the total sum of twenty-one dollars per day of incarceration. In the alternative, they alleged that if the statute in fact requires payment of only one dollar per day to incarcerated witnesses, it is repugnant to the Constitution, and that they and the members of their class are entitled to recover just and adequate compensation for the time of their incarceration.

The Government's answer admitted incarceration of Petitioners and payment to them of only one dollar per day of their incarceration, but alleged that this was in conformity with the statute, and that the statute, as so interpreted, is constitutional.

Insofar as the Complaint prayed for an injunction to restrain the operation and application of 28 U.S.C. §1821 as unconstitutional, Petitioners requested the convening of a three-judge court to hear and determine the matter pursuant to 28 U.S.C. §2282. The trial court denied this request on the basis that Petitioners' Complaint raised no substantial constitutional questions.

The Government's Motion for Summary Judgment was granted by the trial court, and Petitioners' cross-motion for Summary Judgment was denied, on the basis that the proper interpretation of the statute requires payment of only one dollar per day to incarcerated witnesses, and that the statute, as so interpreted, is constitutional.

The Court of Appeals affirmed the judgment of the trial court.

SUMMARY OF ARGUMENT

I. The history of the legislation involved here illustrates that from the earliest days of the Nation's history, Congress has provided for compensation of witnesses attending in federal courts. The first statute to distinguish between incarcerated and non-incarcerated witnesses, passed in 1853, provided full and adequate compensation for incarcerated witnesses, which, at that time in history, was one dollar per day. This is clear from the fact that non-incarcerated witnesses were provided with one dollar and fifty cents per day, and no specific subsistence allowance, although other provisions of the statute illustrate that fifty cents per day was intended as a subsistence allowance. Therefore, when almost one hundred years later the "dollar-a-day" provision was reinstated in the statute, it logically was motivated by the same intent to fully compensate incarcerated witnesses, and was intended as an additional stipend for incarcerated witnesses over and above the per diem allowance therein provided. This is further illustrated by the fact that over the years the allowances in the statute were raised without amendment of the "dollar-a-day" provision.

Moreover, the language of the current statute itself illustrates an intent that incarcerated witnesses receive

the per diem allowance of twenty dollars. Thus, incarcerated witnesses are specifically excluded from the subsistence allowance, yet they are not specifically excluded from the per diem allowance.

In addition, established rules of statutory construction require an interpretation that incarcerated witnesses are entitled to the per diem compensation. This interpretation is in consonance with the obvious general purposes of the statute, viewed in its entirety, whereas the opposite construction contravenes those purposes. One portion of a statute should not be strictly construed so as to deny what has been granted in another portion. The consequences of the opposite construction are harsh and unjust, and such consequences should not be attributed to Congress. A statute cannot be divorced from the circumstances existing at the time it was passed, and, in 1949, when the "dollar-a-day" provision was re-adopted, circumstances in the Nation, economic and otherwise, had changed from what they were in 1853, and continued to change as the allowances were raised without amendment of that provision. Moreover, the opposite construction renders the statute's constitutional validity doubtful.

II. If the statute requires payment of only one dollar per day to incarcerated witnesses, it is repugnant to the Fifth Amendment insofar as it denies due process of law by denying just compensation for the deprivation of liberty involved here. There is no strict dichotomy between the "due process" clause and the "just compensation" clause. This Court has recognized the interdependence between personal liberties and property rights, and has concluded that they are on an equal level for Constitutional purposes. Here, the deprivation of

liberty resulted in deprivation of livelihood and welfare, and therefore of property. That deprivation was so complete and great as to constitute a "taking" within the meaning of the decisions of the Court concerning just compensation. This does not mean that every restriction of liberty must be compensated—only those which are of sufficient magnitude, as here, so as to constitute a "taking", and then only if they are not directly and immediately related to a strong necessity for the protection of the public health and welfare. In denying just compensation in this case, the statute violates the Fifth Amendment.

III. If there is a dichotomy between "due process" and "just compensation," nevertheless the guarantee of due process protects against violations of fundamental principles of justice and fairness, and to protect such principles it may, of its own force, require compensation. In this case, to deprive a man and his family of their livelihood and welfare and the ability to sustain life contravenes such fundamental principles of justice, and in so doing, the statute violates the guarantee of due process.

IV. The statute, so interpreted, violates due process of law by denying equal protection of the law as guaranteed by the Fourteenth Amendment through the Fifth Amendment, insofar as it creates two classes of witnesses for purposes of different treatment, and grants to one class full and adequate compensation for all time involved in serving as a witness, yet grants to the other class only token compensation for the time of its members while they are in jail waiting to testify. There is no rational basis for this discrimination, and no compelling governmental interest is served thereby.

V. The statute, so interpreted, imposes involuntary servitude in violation of the Thirteenth Amendment. This incarceration would clearly be slavery in the strictest sense in the absence of a governmental interest therein. However, that interest is not sufficient to remove the character of slavery. The complete deprivation of liberty and consequent deprivation of livelihood and welfare degrades and injures incarcerated witnesses, and thereby promulgates an essential characteristic of slavery. Adequate compensation alone can raise the incarceration above the level of slavery. In denying such compensation, the statute imposes involuntary servitude.

VI. The trial court erred in denying Petitioners' application for a three-judge court, and the Court of Appeals erred in affirming that action. Jurisdiction did not initially depend upon the existence of a substantial federal question, and therefore the single judge was not warranted in determining whether the constitutional issues involved are substantial before convening a three-judge court. Moreover, the single judge did more than decide the jurisdictional question and dismiss for want thereof; he determined and rendered judgment upon the merits, and this was unauthorized. If, however, he was authorized to determine whether the constitutional issues are substantial, the determination was erroneous, for the issues are clearly not without substance.

FIRST POINT OF ERROR

I.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE PROPER INTERPRETATION OF THE STATUTE (28 U.S.C. Section 1821) REQUIRES PAYMENT OF ONLY ONE DOLLAR PER DAY TO INCARCERATED WITNESSES.

Argument and Authorities

Petitioners alleged in their complaint before the United States District Court that the proper interpretation of the provisions of Section 1821 of Title 28, U.S.C., required that they and the members of their class be paid the sum of at least twenty-one dollars per day for each day of their incarceration as material witnesses who had been unable to give security for their appearance at trial. The District Court granted summary judgment against Petitioners and the members of their class, and such judgment was affirmed on appeal by the United States Court of Appeals for the Fifth Circuit. The Court of Appeals reasoned, firstly, that the statute provides that twenty dollars per day is due only when a witness is "in attendance" in court, and that an incarcerated witness is not in attendance within the meaning of those words; and secondly, that insofar as the statute specifically excludes incarcerated witnesses from the subsistence allowance of sixteen dollars per day, the failure to specifically include them in the terms of the twenty dollar per day compensation provision must be interpreted as a specific exclusion therefrom.

It is urged that this holding is incorrect.

From the earliest days of this Nation, Congress has provided for compensation of witnesses in the Federal

Courts. In 1792, the Second Congress made the following provision for witnesses, 1 Stat. 275, section 3 (1792):

> "Sec. 3. And be it further enacted, That from and after the passing of this act, the fees and compensation to the several officers and other persons hereafter mentioned, shall be as follows;
>
> * * * * *
>
> To witnesses summoned in any of the Courts of the United States the same compensations in each state respectively as are allowed in the supreme courts of the same;"

The Fourth Congress enacted the following, 1 Stat. 492, section 2 (1796):

> "Sec. 2. And be it further enacted, That in addition to the compensation now allowed by law to jurors and witnesses, attending in the courts of the United States, there shall be allowed and paid to each grand and petit juror, for his attendance, fifty cents per day; and to each witness, for like attendance, fifty cents per day."

The Fifth Congress set the compensation of jurors and witnesses at one dollar and twenty-five cents per day, 1 Stat. 624, section 6 (1799).

In 1802, the Circuit Court of the District of Columbia considered the question of whether a witness who had been imprisoned upon her inability to give security for her appearance at trial was entitled to be paid for the time which she had spent in jail, in *Higginson's Case*, 2 Fed. Cas. 132, No. 6,471 (D.C. Cir. 1802). The decision of the Court was as follows:

> "THE COURT allowed the witness to prove her attendance, and ordered her to be paid for the whole time she was detained, it being her misfortune and not her fault that she could not obtain security for her appearance."

The first statute which specifically referred to detained witnesses was passed in 1853. That statute, Rev. Stat. section 848 (1875); 10 Stat. 161 (1853), read, in pertinent part, as follows:

"*Witnesses' Fees.* For each day's attendance in court, or before any officer pursuant to law, one dollar and fifty cents, and five cents per mile for travelling from his place of residence to said place of trial or hearing, and five cents per mile for returning. When a witness is subpoenaed in more than one cause between the same parties in different suits at the same court, but one travel fee and one per diem compensation shall be allowed for attendance, to be taxed in the first case disposed of, and 'per diem' only in the other causes, to be taxed from that time in each case, in the order in which they may be disposed of.

When a witness is detained in prison for want of security for his appearance, he shall be entitled to a compensation of one dollar per day over and above his subsistence.

* * * * *

There shall be paid to such seamen or other person as has been or shall be sent to the United States from any foreign port, station, sea, or ocean, by any United States Minister, Charge d'Affaires, Consul, Commander, or Captain, to give testimony in any criminal case which has been or may be pending in any court of the United States, such compensation as the court which had or shall have cognizance of the crime, shall adjudge to be right and proper, not to exceed one dollar for each day the said seaman or person has been or shall be necessarily on the voyage, and arriving at the place of examination or trial, exclusive of sustenance and transportation; the court to take into

consideration, in fixing said compensation, the condition of said seaman or witness; whether his voyage has been broken up, to his injury, by his being sent to the United States, or not.

If said seaman or person has been or shall be transported in an armed vessel of the United States, no charge for sustenance or transporation shall be made; if in any other vessel, the court may adjudge what compensation shall be paid to the captain of said vessel, and the same shall be paid accordingly: *Provided*, That in no case shall transportation and subsistence be allowed at a rate exceeding fifty cents per diem."

It is abundantly clear that by this statute, Congress intended that incarcerated witnesses be fully compensated daily for the time which they spent in jail. It provided for compensation of one dollar and fifty cents for non-incarcerated witnesses; and of one dollar for incarcerated witnesses. No specific subsistence allowance was provided for, as it is in the current statute; yet it is obvious from the language therein that Congress determined that at that time in history, the sum of one dollar per day was adequate compensation allowance, and the sum of fifty cents per day was adequate subsistence allowance. Thus, the statute provided that witnesses who traveled from foreign territory were to receive "such compensation as the court . . . shall adjudge to be right and proper, not to exceed one dollar for each day. . . ." Transportation and sustenance compensation was to be paid to the captain of the vessel transporting such witnesses, with the proviso that "in no case shall transportation and subsistence be allowed at a rate exceeding fifty cents per diem."

Obviously, the Thirty-Second Congress intended that incarcerated witnesses should receive per diem compen-

sation at the rate of one dollar per day, just as non-incarcerated witnesses, but not the subsistence allowance of fifty cents per day, insofar as their subsistence would be provided for in jail.

Moreover, the statute in no way restricted the per diem compensation of incarcerated witnesses to the time spent actually testifying in court, but rather declared that the compensation was to be "per day." This compensation was declared to be payable "over and above his subsistence," making it clear that the compensation was intended to provide for lost time and income.

This statute was in effect for seventy-three years, until 1926, when it was replaced by 44 Stat. 324 (1926). The new statute omitted the provisions for compensation of incarcerated witnesses; raised the per diem compensation rate to two dollars per day; and added a provision for subsistence allowance at the rate of three dollars per day, from which incarcerated witnesses were specifically excluded.

In 1948, provisions for the compensation of witnesses were codified into Title 28, the Judiciary and Judicial Procedure Code, section 1821, by 62 Stat. 950 (1948). That section of the statute, in its entirety, read as follows:

"§1821. PER DIEM AND MILEAGE GENERALLY; SUBSISTENCE

A witness attending in any court of the United States or before a United States commissioner or person taking his deposition pursuant to any order of a court of the United States, shall receive $2 for each day's attendance and for the time necessarily occupied in going to and returning from the same, and 5 cents per mile for going from and returning to his place of residence. Witnesses who are not salaried

> employees of the Government and who are not in custody and who attend at points so far removed from their respective residences as to prohibit return thereto from day to day shall be entitled to an additional allowance of $3 per day for expenses of subsistence."

The following year, the per diem rate was raised to four dollars a day, and the subsistence rate to five dollars a day. 63 Stat. 65 (1949).

Then, after almost one hundred years since the date of enactment of the 1853 statute, the "dollar a day" provision reappeared in the Code. 63 Stat. 103 (1949) amended section 1821 in the following language:

> "Sec. 94. Section 1821 of Title 28, United States Code, is amended by inserting at the end thereof a new paragraph, as follows:
>
> 'When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of $1 per day.' "

Thus, the language of the 1853 statute was restored almost verbatim. The House Report concerning the bill, H.R. Rep. No. 352, 81st Cong., 1st Sess. 16 (1949) states the following concerning this amendment:

> "Section 94 of the Bill. This section restores certain provisions of the original statute, R.S. §848, which were inadvertently omitted from revised Title 28, U.S.C. §1821."

In the opening remarks of the Report, the Bill is referred to as a "correctional bill" which "corrects typographical and other minor errors and clarifies the language of some sections to conform more closely to the original law. . . ." (pp. 1, 2)

Thereafter, the "dollar-a-day" provision survived various other irrevelant changes in the language of the section and raises of the rate of compensation and subsistence, and continues to exist in the current statute. 65 Stat. 727 (1951); 68 Stat. 1242 (1954); 70 Stat. 798 (1956), (raised subsistence to $8); 82 Stat. 62 (1968), (raised per diem to $20, subsistence to $16, and raised mileage allowance).

It is submitted that the legislative history reviewed hereinabove clearly indicates that when the 81st Congress re-adopted the language of the 1853 statute in 1949, it intended a very different result than that which was intended by the similar language utilized by the 32nd Congress in 1853. As has been discussed above, there is no question that the 1853 statute was intended to fully compensate incarcerated witnesses for their lost time and income at a rate which, at that time, was adequate and which was fully in consonance with the rate at which non-incarcerated witnesses were compensated. When the language was re-adopted, it was done for the expressed purpose of "conform(ing) more closely to the original law . . .". That original law exhibited no desire to deprive incarcerated witnesses from adequate compensation—on the contrary, it clearly expressed the opposite desire, and recognized the need of incarcerated witnesses. It is submitted that the 1949 amendment was a further recognition of that need—a recognition that incarcerated witnesses, by virtue of their lack of mobility and freedom, would be in need of funds over and above the compensation designed to replace their lost income and the day to day subsistence provided them in jail. Just as a witness who travelled from a distant place would be in need of funds with which to provide himself with room and board, an incarcerated witness would be in need of

toiletries and other personal articles with which he could not provide himself while in jail.

This reasoning is borne out by the fact that later legislatures amended the language of the statute and raised the rates of compensation and subsistence, yet none of them altered the language of the "dollar-a-day" provision. Thus, in 1968, the rate of per diem compensation was raised to twenty dollars, and the rate of subsistence compensation was raised to sixteen dollars; yet the "dollar-a-day" provision remained unaltered. Obviously, the intent of this amendment was to modernize the rates of compensation in order that the statute would properly accomplish its essential purpose—to compensate witnesses and provide against financial loss as a result of performing this service. Is it logical to assume that the legislature chose to ignore this purpose—a purpose which had been exhibited even in the earliest statutes—with respect to incarcerated witnesses? It is more logical to conclude that at this time the "dollar-a-day" provision had taken on new meaning from what it had in 1853. In 1853, it was total and adequate compensation; in 1968, it was, as the Court of Appeals concluded, "a stipend for items of personal comfort and care needed by one in confinement, such as toilet articles, sweets, and reading matter." (section 2b of opinion, 5th paragraph)

The language of the current statute, in and of itself, contains various indications of the legislative intent that incarcerated witnesses receive both the twenty-dollar-per-day and the dollar-per-day compensation. Firstly, the statute is obviously designed to fully compensate witnesses for any and all pecuniary losses or needs which might result from their rendering service as witnesses, as

far as possible. It provides for a per diem compensation to defray lost time and income, and declares that such compensation is payable not only when a witness is in attendance, but also for the time he spends in travelling to and from court. It provides for a mileage allowance to compensate for travel expenses to and from court. It provides for a subsistence allowance for witnesses who travel from distant places in order to defray their expenses for hotel and meals. It provides that witnesses who travel from outside the continental United States are entitled to the actual expenses of their travel at first-class rates, rather than the mileage allowance of ten cents per mile, lest their actual expenses exceed the allowance.

In view of such careful and deliberate effort to protect against pecuniary losses to witnesses, is it reasonable to include that the legislature abandoned the effort when it came to incarcerated witnesses, and chose to ignore them and provide them with mere token compensation? If so, on what basis can such conclusion be reached? Are incarcerated witnesses criminals to be disdained and punished? Surely not. Indeed, it is much more logical to conclude that the effort was extended to provide incarcerated witnesses with their needs in the form of toiletries, tobacco, and reading materials while they were in jail.

In addition, the statute specifically excludes incarcerated witnesses from the subsistence allowance of sixteen dollars per day. This is logical, insofar as their "room and board" is provided for them in jail. Yet, had it been the intention of the legislature to exclude incarcerated witnesses from the per diem compensation of twenty dollars per day, would it not have been equally as specific in its language to accomplish this? Would it not have said "witnesses . . . who are not in

custody . . ." in the sentence dealing with subsistence? Logic compels an affirmative answer.

Moreover, one portion of a statute should not be construed to annul or destroy what has been granted by another portion. *Peck v. Jenness*, 48 U.S. 162, 7 How. 612, 12 L.Ed. 841 (1849). Here, the beginning sentence of the statute has provided for per diem compensation for witnesses without reservation. The fact that incarcerated witnesses have been excluded from another type of compensation, or have been provided with additional compensation, should not be construed to deprive them of that which was granted in the first sentence, in the absence of a clear expression on the part of the legislature of an intention to so deprive them.

The application of other established rules of statutory construction likewise compels the conclusion that the true meaning of this statute requires payment of the twenty-dollar-per-day per diem compensation to incarcerated witnesses. In this regard, it is fundamental that the consequences of alternative interpretations of a statute provide an insight as to the congressional purposes behind it. *Brooks v. U.S.*, 337 U.S. 49, 69 S.Ct. 918, 93 L.Ed. 1200 (1949). When a statute is subject to more than one construction, it should not be given a construction which will prove deeply harsh and unjust in its consequences, both as it respects public and individual rights and interests. *Wilson v. Rousseau*, 45 U.S. 646, 4 How. 646, 11 L.Ed. 1141 (1846); *Knowlton v. Moore*, 178 U.S. 41, 20 S.Ct. 747, 44 L.Ed. 969 (1900); *Burnet v. Guggenheim*, 288 U.S. 280, 53 S.Ct. 369, 77 L.Ed. 748 (1933). It cannot be presumed that the legislature will do acts that inflict hardship and injustice. *East Saginaw Salt Mfg. Co. v. City of East Saginaw*, 80 U.S. 373, 13 Wall. 373, 202 L.Ed. 611 (1871). On the contrary, it must be

assumed that the members of Congress are sensitive to and respectful of the rights and liberties of individuals. *Ex Parte Mitzuye Endo*, 323 U.S. 283, 65 S.Ct. 208, 89 L.Ed. 243 (1945).

With regard to the statute in issue here, what will be the consequences of an interpretation that incarcerated witnesses are entitled to receive only one dollar per day while incarcerated? Obviously, the consequences will be that such witnesses will be incarcerated for days and months at a time and will receive only a token and meager compensation of one dollar per day. Thus, Petitioners Felipe Juarez Hurtado and Ramon Avila Hurtado alleged that they had been incarcerated from the 25th day of March, 1970, to the 19th day of June, 1970, for a period of almost three months. Upon their belated release, they were, presumably, handed checks for approximately eighty-six dollars in compensation of their three month incarceration. It takes no great stretch of the imagination to conceive what must have been the disastrous effects upon their financial well-being and upon their families of this travesty of justice.

It is only reasonable to assume that witnesses who are incarcerated for want of security for their appearance, or at least the great majority of them, are working men and members of the lower financial echelons, for otherwise they would have the means with which to give such security. They are men who work for daily bread for themselves and their families, and to deprive them of a day of their lives is to deprive them of such daily bread, and compensation for that deprivation at the rate of one dollar per day is no compensation at all. Most of them are released from jail only to spend the greater portion of their dollar-a-day "compensation" for transportation back to their homes and needy families, where they return empty-handed.

What then are the consequences of the interpretation given the statute by the lower courts? Financial ruin, poverty, starvation, and untold hardship. Can such consequences properly be atrributed to the Congress of the United States?

Clearly, the more reasonable and beneficial interpretation must prevail. The Court need look no farther than the statute itself to determine that the sum of one dollar per day is wholly inadequate compensation, for the legislature has expressed therein its determination that the sum of twenty dollars per day is adequate per diem compensation.

Moreover, the fact that at one time in history the "dollar-a-day" provision was intended to provide for the entire compensation to be given to incarcerated witnesses does not require a different result, insofar as statutes should not be narrowly construed to permit evasion of their purpose because of changes in circumstances resulting from the passage of time. *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 88 S.Ct. 2084, 20 L.Ed.2d 1176 (1968). A section of a statute should not be read in isolation from the context of the whole act, and, in interpreting legislation, the Court should not be guided by a single sentence or portion of a sentence, but should look to the provisions of the whole law and to its object and policy. *Richards v. U.S.*, 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962). A construction of a statute which will produce a consequence directly opposite to the whole spirit of the statute should be avoided, *Postmaster General v. Early*, 25 U.S. 136, 12 Wheat. 136, 6 L.Ed. 577 (1827), for the general purpose of a statute is a more important aid to the meaning thereof than any rule of grammar or formal logic. *U.S. v. Shirey*, 359 U.S. 255, 79 S.Ct. 746, 3 L.Ed.2d 789 (1959).

As has been discussed hereinabove, the statute, read in its entirety, exhibits a strong purpose that witnesses should be fully compensated for their time and expenses in giving service as witnesses, and should not suffer any pecuniary losses as a result thereof. The "dollar-a-day" provision cannot be read in isolation from that spirit and purpose. A strict interpretation of the statute to mean that incarcerated witnesses should receive only one dollar per day is repugnant to the obvious general purpose and spirit of the statute to fully compensate witnesses. That purpose was also clearly expressed in the statute of 1853; yet, to give the same language the same interpretation today as it had then would defeat the purpose.

A statute cannot be divorced from the circumstances existing at the time it was passed and from the object of Congress in passing it. *U.S. v. Champlin Refining Co.*, 341 U.S. 290, 71 S.Ct. 715, 95 L.Ed. 949 (1951). When, in 1949, Congress re-adopted the language of the statute of 1853, the circumstances, economic and otherwise, existing in the Nation had changed considerably from what they were in 1853. In 1853, one dollar per day was adequate compensation; in 1949, this was no longer true. By 1968, when the per diem compensation was raised to [illegible] per day without alteration of the "dollar-a-day" provision, the concept of one dollar per day as adequate compensation had become laughable.

The same may be said of the fact that the statute uses the term "compensation" in the sentence dealing with the "dollar-a-day" provision. A thing may be within the letter of a statute, and yet not be within the statute itself, because it is not within the spirit thereof or within the intention of its makers. *National Woodwork Mfrs. Ass'n. v. N.L.R.B.*, 386 U.S. 612, 87 S.Ct. 1250, 18 L.Ed.2d 357 (1967). Here, it is obvious that the term

"compensation" was not intended to have its usual meaning of "full compensation", or the same meaning as the term "per diem" used in the title of the statute, but rather was used in the sense of "additional compensation," or to denote the fact that this payment was to be over and above, and separate and apart from, the "per diem" and "subsistence" allowances which had been previously spelled out. Indeed, the term "compensation" is not used in the first sentence of the statute, dealing with "per diem", as it had been in previous statutes, such as the statute of 1853.

Finally, it is submitted that the reasoning of the Court of Appeals, to the effect that the words "attending in any court" used in the first sentence of the statute are words of limitation which operate to exclude incarcerated witnesses from that portion of the statute, is incorrect.

Firstly, the reasoning is inconsistent with logic. Incarcerated witnesses are in jail for one reason and for one reason alone—in order that they will be available to testify for the Government in the court where the particular cause is pending. They are at the beck and call of the court. They remain in prison until they have fulfilled the purpose of the court and the Government. There is no logical explanation of their situation other than that they are "attending in" court. They are "attending in" court just as a witness who is waiting in his hotel room to be informed as to when he should appear is "attending in" court.

In this connection, the Court is asked to consider the following situation: a witness is called to testify in a pending criminal prosecution which is to be tried on Wednesday. He resides in the District of Columbia. He leaves from D.C. on Sunday morning and arrives by automobile in El Paso on Tuesday afternoon. He reports

to the office of the United States Attorney and is informed that the cause has been postponed and trial will not be convened until Friday morning. He is instructed to remain available at his hotel and to report on Friday morning if he is not called sooner. He reports on Friday morning, and is instructed to sit on the bench in the hall until he is called. He sits there all day, and late in the afternoon, he is informed that court is recessed until Monday morning, at which time it is expected that he will be called. He is not called until Tuesday afternoon, and after testifying he is excused. What compensation is he entitled to? Was he "attending in" court only on the day which he testified? It is submitted that he would, in fact, be paid $20 for each and every day which passed between the day he left and the day he returned to his home. It is further submitted that he would be so paid even if on the last day of his presence in El Paso the defendant decided to change his plea to a plea of guilty so as to do away with the necessity of his testimony. (The Government refused to answer interrogatories filed by Petitioners in the trial court directed at such a situation.)

Is there any logical basis on which to distinguish this situation from that of the witness waiting in jail to be called to testify?

In consonance with this logic, state courts have interpreted the phrase "attendance in court" to mean any period in which the person is not excused by the court itself and allowed to be engaged in ordinary vocations. *Words and Phrases*, Vol. 4a, p. 501; *Jacobs v. Elliot*, 37 P. 942, 104 Col. 318; *Ellis v. Degams*, 24 A. 579, 580, 17 R.I. 715; *Mason v. Culbert*, 41 P. 464, 108 Col. 247.

And, as has been discussed hereinabove, it was held in *Higginson's Case*, 2 Fed. Cas. 132, No. 6,471 (D.C. Cir 1802) that incarcerated witnesses are entitled to be compensated for each day of their incarceration.

Moreover, the statute of 1853 contained a similar phrase, "attendance in court," yet there is no question that the statute intended that incarcerated witnesses be compensated for each day of their incarceration.

In summation, therefore, the history of the legislation involved here, the language of the statute itself, recognized rules of statutory construction, logic and reason, fairness and justice, all compel an interpretation of the statute which requires the payment to incarcerated witnesses of the sum of twenty-one dollars per day for each day of their incarceration.

SECOND POINT OF ERROR

II.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE STSTUTE AS INTERPRETED BY THE COURT, DOES NOT DEPRIVE PETITIONERS OF DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

(A) The Statute Deprives Petitioners of Just Compensation in Violation of the Fifth Amendment.

Argument and Authorities in Support of Point II (A)

Petitioners urged the lower Courts that if the statute must be interpreted to require the payment to incarcerated witnesses of only one dollar per day, then the statute is repugnant to the Fifth Amendment to the

Constitution of the United States insofar as it deprives Petitioners and the members of their class of just compensation for the deprivation of their liberty, and therefore of due process of law as guaranteed by that Amendment.

In rejecting this contention, the Court of Appeals reasoned, basically, as follows: first, that to hold that deprivation of liberty must be justly compensated is to imply that liberty may lawfully be deprived so long as it is justly compensated for; second, that the language of the Fifth Amendment creates a strict dichotomy between the "due process" protection and the "just compensation" protection, and liberty is not private property within the meaning of the "just compensation" clause, such that liberty and the ability to earn a living are protected only through the procedural guarantees of the "due process" clause; and third, that it would be difficult to contain within rational limits the theory that deprivation of liberty is to be compensated.

It certainly cannot be denied that the concept of compensation for deprivation of liberty is not a familiar one. Fortunately, non-criminal deprivation of liberty itself is not familiar in this Nation. However, this Court has never acknowledged any great gap between the concepts of Constitutional protections of liberty and those of private property, nor held that property is entitled to any more protection than liberty.

On the contrary, the Court recently said, in another context, the following:

"Such difficulties indicate that the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have

meaning without the other." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972).

This reasoning is consistent with earlier decisions recognizing that interdependence between personal rights and property rights. Thus, in *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959) it was stated:

> "The right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment."

It is established that a man's business, occupation, profession or calling is his property and is protected by the Constitution. *Slaughter House Cases*, 16 Wall. 36, 21 L.Ed. 394. Moreover, the right to sell or not to sell one's labor or services is not only a right of liberty, but a right of property, protected by the Constitution. *N.L.R.B. v. Local 74, United Brotherhood of Carpenters and Joiners of America, A.F. of L.*, 181 F.2d 126 (C.A. 6th Cir. 1950), affirmed 341 U.S. 707, 71 S.Ct. 966, 95 L.Ed. 1309.

Clearly, a day in the life of a working man is as much "property" to him as is an acre of land to a landholder. As stated by Justice Douglas in his concurring opinion in *Peters v. Hobby*, 349 U.S. 331, 75 S.Ct. 790, 99 L.Ed. 1129 (1955):

> ". . . one of man's most precious liberties is his right to work." 349 U.S. at 352.

The "interdependence . . . between the personal right to liberty and the personal right in property" spoken of in *Lynch* is clearly illustrated by the decisions of this

Court to the effect that when a government imposes restrictions upon one's *liberty* to use his property, and such restrictions are of great magnitude, that constitutes a "taking" of the property which cannot be permitted consistently with the guarantee of due process of law in the absence of just compensation, although the property itself is not in fact "taken" by the government, but rather its owner's liberty to use it is restricted. Thus, in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), the Court held unconstitutional a Pennsylvania statute which prohibited the mining of coal when such mining endangered the surface and surface structures, in a situation where the Petitioner held contractual rights to so mine and, if necessary, to damage the surface. The Court stated:

> "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts."

In decisions such as *Pennsylvania Coal* and its progeny lies the answer to the Fifth Circuit's concern over containing the theory of compensation for deprivation of liberty within rational limits. Not every restriction upon the use of private property is required by the Fifth Amendment to be compensated; only such restrictions as

are of such magnitude and extent as to logically permit them to be classed as a "taking" of the property. By the same token, it is unquestionable that not every governmental restriction upon personal liberty is compensable. Restrictions upon personal liberty are common in everyday life. For example, it is probable that the government could properly require an individual to appear and testify as a witness for the government without compensation.

In the case before the Court, however, the difference is the *magnitude* of the restriction upon liberty. Petitioners were locked behind bars. This is *complete* deprivation of liberty; it goes beyond mere restriction or inconvenience. Petitioners' liberty was taken, in a very real sense, for purposes of the government. A portion of the very lives of Petitioners was confiscated. Just as a man's property is "taken" when the government imposes restrictions upon his liberty to use the property to such an extent that the property is rendered without value, so a man's personal liberty

liberty is "taken" when he is placed behind bars. While he is incarcerated, his liberty is without value; indeed, he has no liberty.

It is true that there are situations where the actual taking of property by the government, in the literal rather than figurative sense, can be constitutionally valid even in the absence of compensation. This is so when the taking is necessary to the protection of the public health, safety and welfare in a sufficiently direct and immediate sense. For example, in *Miller v. Schoene*, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928), the Court upheld as constitutional an order for the destruction of privately-owned cedar trees without compensation,

insofar as the government of Virginia, in issuing the order, was combating a cedar-rust epidemic.

Again, as has been often said by the Court, the existence of such a situation as will permit the taking of property without compensation depends upon the facts of each case, and no set rule exists for such determination.

Similarly, there are situations in which it is clear that the government may completely deprive an individual of his personal liberty without providing compensation. Examples of such situations are: the involuntary commitment of a mentally ill individual, *Minnesota ex. rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270, 60 S.Ct. 523, 84 L.Ed. 744 (1940); and the involuntary commitment of an individual as a drug addict or alcoholic, *Re De La O*, 59 Cal.2d 128, 28 Cal. Rptr. 489, 378 P.2d 793 (1963), cert. den. 374 U.S. 856, 83 S.Ct. 1927, 10 L.Ed.2d 1076. In these situations, it is clear that the deprivation of liberty is so directly and immediately necessary for the protection of the public, as well as individual, health, safety and welfare as to justify it without compensation.

In the case before the Court, however, it is urged that no such direct and immediate relation to the public health, safety and welfare exists so as to justify the deprivation of Petitioners' liberty without compensation. Petitioners were incarcerated in order that they might be available to testify as witnesses for the government in a pending criminal prosecution. Presumably, their testimony might result in the conviction of a defendant charged with a federal crime. Obviously, any public benefit which might result from this is wholly indirect, and certainly not of sufficient proprotion to justify the

complete deprivation of liberty which Petitioners suffered without just compensation. No great public evil was avoided by Petitioners' incarceration, and no widespread public good was accomplished.

In summation, it is urged that personal liberty is on a level with "property" as that term is used in the Fifth Amendment, and where liberty is so completely deprived as it was here, in the absence of a direct, immediate and sufficiently great necessity for the protection of the public health, safety and welfare, the Fifth Amendment requires that such deprivation be justly compensated.

(B) The Statute Deprives Petitioners of "Substantive" Due Process of Law in Violation of the Fifth Amendment.

Argument and Authorities in Support of Point II (B)

If, in fact, there is a dichotomy between the "just compensation" and the "due process" clauses of the Fifth Amendment, it is urged that, nevertheless, the guarantee of due process of law embodies more than mere procedural protections, and if the fundamental justice which it guards requires payment of just compensation, then it will operate of its own force to so require.

It was said in *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), that:

> "Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' *Snyder v. Massachusetts* 291 U.S. 97,

105, or are 'implicit in the concept of ordered liberty.' *Palko v. Connecticut*, 302 U.S. 319, 325." 342 U.S. at 169.

The Court went on to refer to the guarantee of due process of law as protecting "immutable and fundamental principles of justice" and "respect (for) certain decencies of civilized conduct", and as protecting against "conduct that shocks the conscience," and "methods to close to the rack and screw" which "offend 'a sense of justice' ".

Similarly, in *Herbert v. Louisiana*, 272 U.S. 312, 316, 47 S.Ct. 103, 71 L.Ed. 270 (1926), the guarantee was said to protect "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."

The question here is whether in this day and age in the United States of America an individual may be incarcerated as a material witness and paid only one dollar for each day of such incarceration, in the face of the guarantee of due process of law.

An affirmative answer exhibits an utter disregard for the dignity of the human being and, indeed, for human life itself. In these times, an adequate and regular income is essential to the sustenance of life, the individual, and the family. To deprive a man of both his liberty and his necessary income is to strip him of all aspects of a free individual and human being.

If what was done to Petitioners was done to American citizens in a foreign country, we would surely term it an atrocity. It is no less an atrocity on our soil.

The framers of the Constitution had very much in mind the non-criminal incarcerations to which they and their families had been subjected, such as imprisonment for debt, and the consequences which it had upon the

lives and welfare of their loved ones. They surely intended, in drafting the Constitution, that the pages of American history would never reveal such harsh and shocking injustice as they had endured.

In short, it is urged that the guarantee of due process of law insures that the government may not wreak destruction upon individual lives and families as it has done here. This deprivation of liberty and livelihood violates fundamental principles of justice, is shocking to the traditions and conscience of the Nation, and offends the decencies of civilized conduct. Just compensation to Petitioners for the deprivation of their liberty which they were forced to endure is essential to the validity of their incarceration in accordance with the guarantee of due process of law, insofar as it is essential to their continued status as human beings rather than chattels or livestock, to be reluctantly fed until their purpose is fulfilled. If the government must deprive liberty in order to fulfill its functions, let it at least not deprive welfare.

The enforcement of one protection very often operates to give strength to other protections. In this case, the enforcement of the protection against deprivation of welfare will logically operate to avoid the consequence of the deprivation, illustrated by the cases of Petitioners Felipe Juarez Hurtado and Ramon Avila Hurtado, who were obviously forgotten in jail and allowed to languish there until such time as the government casually decided that it was ready for their services, almost three months after the date of their incarceration.

(C) The Statute Deprives Petitioners of Due Process of Law by Depriving Them of Equal Protection of the Law.

Although the Fifth Amendment contains no "equal protection" clause, as does the Fourteenth Amendment, an act of Congress which if passed by a state legislature would be violative of the guarantee of equal protection of the law contained in the Fourteenth Amendment, is violative of the guarantee of due process of law contained in the Fifth Amendment. *Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 81 (1943); *Shapiro v. Thompson*, 394 U.S. 618, 642, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969).

Petitioners contended in the lower Courts that the statute, if interpreted to require the payment of only one dollar per day to incarcerated witnesses, was violative of the guarantee of due process of law insofar as it deprived then and the members of their class of equal protection of the law by providing for full and adequate compensation of non-incarcerated witnesses for their time spent in service as witnesses, including the time spent in travelling to and from court, while providing for the payment of only one dollar per day to incarcerated witnesses for the time of their incarceration.

In rejecting this contention, the Court of Appeals reasoned that the statute creates no inequity, insofar as it provides for the payment of twenty dollars per day to all witnesses while "attending in court", meaning, presumably, while present at the courtroom or actually testifying.

This reasoning is based on two assumptions which are improper: first, that incarcerated witnesses are paid the twenty dollars per day when they actually testify; and

second, that non-incarcerated witnesses are paid the twenty dollars per day only when they actually testify, or at least are present at the courtroom waiting to testify.

Petitioners alleged in their First Amended Complaint, paragraph X, as follows:

> ". . . the statute . . . provides for the payment of as much as thirty-six ($36.00) dollars per day for witnesses who are waiting to be called to testify in the comfort of their hotel room while it provides for only one dollar ($1.00) per day to those deprived of their freedom who are waiting for the same thing and for the same reason in the county jail. In this connection, Plaintiffs would show the court that the Government pays others called as witnesses the sum of twenty dollars ($20.00) per day for attending in Court and whether they are called to testify or not while it pays members of Plaintiffs' class the sole sum of one dollar ($1.00) per day even during the time that the court in which they are to testify in is actually in session and has called the specific case in which each is to testify. Plaintiffs further allege that on many occasions when they give statements and testify for the Government in other Administrative proceedings they are not paid the twenty dollars ($20.00) per day."

It must be remembered that the case never went to trial, but was disposed of by summary judgment, such that Petitioners were never granted the opportunity to prove these allegations. If, in fact, the issue of equal protection turns upon the truth or falsity of these matters, then summary judgment was improper, insofar as a fact issue existed in the case.

It is urged, however, that even assuming that the assumptions made by the Court of Appeals are correct,

nevertheless the reasoning of the Court does not justify the essential inequality of the statute.

It is undeniable that the statute creates two classes of witnesses for the purpose of compensation—incarcerated witnesses and non-incarcerated witnesses. The two classes are indistinguishable except for the fact that one is composed of witnesses who are free to come and go as they please and stay where they please, so long as they are present in court to testify when necessary, while the other is composed of witnesses who have been incarcerated upon the affidavit of a United States Attorney or other person that there is reason to believe that it may become impracticable to secure their presence at trial by subpoena, and upon their inability to give bail in the amount set by the court or commissioner to whom the affidavit is presented as security for their appearance.

Non-incarcerated witnesses are provided by the statute with a per-diem compensation of twenty dollars per day for all of the time which they spend in service as witnesses, including the time spent in travelling to and from the place where court is to be held. With regard to incarcerated witnesses, the statute provides for payment of only one dollar per day for the time they spend in jail awaiting the trial.

Thus, witnesses who are fortunate enought to have permanent residence at a place where they may be served with subpoena, or who have the financial means to give bail for their appearance, are fully and adequately compensated for all of the time which they spend in service as witnesses and in travel to and from the court, and leave the courthouse with a check for twenty dollars for each day of their time so spent, together with the

additional sum of sixteen dollars per day and ten cents per mile of travel if they came in from out of town. Witnesses who unfortunately are in a situation which subjects them to Rule 46 (b) and who are without the financial means to make bail are paid one dollar per day.

This is the inequity, and it cannot be answered by reasoning that incarcerated witnesses are paid twenty dollars per day for the day on which they testify, just as non-incarcerated witnesses. The fact that, by the government's own action and for its own purposes, incarcerated witnesses are deprived of more time and more liberty than non-incarcerated witnesses does not detract from the fact that the statute provides for full compensation of all of a non-incarcerated witness' time, but for almost no compensation for the time and liberty of an incarcerated witness.

It is well established that the Equal Protection Clause prohibits a government from establishing classifications for purposes of different governmental treatment of groups of persons, unless such classifications bear a rational relationship to some compelling governmental interest. *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); *Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971). Thus, in *Graham v. Richardson*, the Court held unconstitutional an Arizona statute which denied welfare assistance to resident aliens who had not resided in the United States for a total of fifteen years or more. In *Shapiro v. Thompson*, the Court held unconstitutional statutes which existed in Connecticut, Pennsylvania, and the District of Columbia which denied welfare benefits to persons who had not resided within the state for at least one year, holding, *inter alia*, that a government may

legitimately attempt to limit its expenditures, but not by invidious distinctions between classes of persons, such that the saving of costs alone is not such a compelling state interest as to justify such discrimination.

With regard to this statute, it is urged that no rational basis exists for excluding incarcerated witnesses from the per diem compensation provided for non-incarcerated witnesses, and no compelling governmental interest is served thereby. The only conceivable explanation for the discrimination is that by reason of the fact that incarcerated witnesses are in jail for longer periods of time than non-incarcerated witnesses are present for trial, the government saves money by excluding incarcerated witnesses from the per diem compensation. As stated above, it was held in *Shapiro v. Thompson*, supra., that the saving of money by the government cannot justify an otherwise invidious classification. Thus, footnote No. 11 in the Court's opinion in *Shapiro*, 394 U.S. at 633, reads as follows:

> "In *Rinaldi v. Yeager*, 384 U.S. 305 (1966), New Jersey attempted to reduce expenditures by requiring prisoners who took an unsuccessful appeal to reimburse the State out of their institutional earnings for the cost of furnishing a trial transcript. This Court held the New Jersey statute unconstitutional because it did not require similar repayments from unsuccessful appellants given a suspended sentence, placed on probation, or sentenced only to a fine. There was no rational basis for the distinction between unsuccessful appellants who were in prison and those who were not."

So it is here. There is no rational basis for distinction between witnesses who are in jail and those who are not. In fact, there is less of a basis than there was in *Rinaldi*, for Petitioners are not criminals to be punished for some wrongdoing.

Moreover, the classifications established by the statute, on their very face, are based upon a discrimination between the solvent and the indigent. A witness who is financially able to give security for his appearance will remain free, and when he is called to appear, he will be paid twenty dollars for each day of his time spent as a witness. It is clear that the intention of the statute is that he be so paid even if he were to wait in his hotel for a week or a month to be called, and then be dismissed without having testified. On the other hand, a witness who has no funds with which to give security for his appearance must wait in jail for trial, and receives only one dollar per day.

In addition, Petitioners alleged that they and the members of their class are Mexican aliens, and that the statute is applied primarily, if not exclusively, against Mexican aliens. Although the statute does not, by its terms, limit the class of witnesses deprived of per diem compensation to aliens, it is only logical that this is its effect, insofar as aliens are the most likely persons who will not be available for trial and whose presence cannot be secured through subpoena. The fact that Petitioners and the members of their class are aliens does not deprive them of the protection of the Equal Protection Clause; on the contrary, it is submitted that this fact renders the statutory classification a "suspect" classification such as that in *Graham v. Richardson*, supra. As such, the classification must be presumed invidious in the absence of a demonstration of a rational connection to a compelling governmental interest in its creation.

In terms of rationality, it certainly would have been more rational to grant the per diem compensation only to incarcerated witnesses, and to deny it to free witnesses,

insofar as the deprivation of liberty, or rather the restriction thereof, suffered by non-incarcerated witnesses is slight in comparison to that suffered by incarcerated witnesses. The reverse situation is devoid of rationality.

The consequences of the discrimination imposed by the statute are not a mere "mischief," as concluded by the Court of Appeals, which the government may pursue with "partial solutions." The consequences are grave, harsh and unust. On the sole basis of their incarceration, Petitioners are denied the compensation granted to other witnesses, upon which "may depend the ability of (their) families to obtain the very means to subsist—food, shelter, and other necessities of life." *Shapiro v. Thompson*, supra., 394 U.S. at 627.

For these reasons, it is urged that the statute, in excluding incarcerated witnesses from receiving the twenty-dollar-per-day per diem compensation, deprives Petitioners of equal protection of the law, and therefore of due process of law, as guaranteed by the Fifth Amendment.

THIRD POINT OF ERROR

III.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE STATUTE, AS INTERPRETED, DOES NOT CREATE AN INVOLUNTARY SERVITUDE IN CONTRAVENTION OF THE THIRTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Argument and Authorities

Petitioners contended in the lower courts that the statute, as interpreted by those courts to require payment of only one dollar per day to incarcerated witnesses, is violative of the Thirteenth Amendment's prohibition against involuntary servitude.

In rejecting this contention, the Court of Appeals reasoned that it is not uncompensated service, but involuntary servitude which is prohibited by the Thirteenth Amendment, and cited various examples of governmental restrictions upon liberty which do not constitute involuntary servitude.

It is submitted that here, again, the Court of Appeals failed to give proper consideration to the *degree* of the deprivation of liberty Petitioners underwent. This goes beyond mere inconvenience or restriction; this is complete and absolute deprivation of liberty. This is incarceration for the government's own purposes and for no other purpose. Petitioners were deprived of a portion of their lives and livelihood, and therefore of their welfare, in order that they would be available to serve the government.

Petitioners recognize that involuntary servitude is violative of the Constitution regardless of whether or not

it is compensated. It does not follow, however, that compensation cannot be a requirement of the guarantee against involuntary servitude, or that involuntary servitude cannot be the result of the absence of compensation.

Petitioners have not disputed the government's interest in having them available to testify in pending criminal prosecutions. The question is whether that interest is sufficient, without more, to remove Petitioners' incarceration from the prohibition of involuntary servitude.

The Thirteenth Amendment is not only a prohibition of slavery in the literal sense, but an absolute declaration that the badges and incidents of slavery shall not exist in the United States. *Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968).

The primary object of the Amendment, of course, was to abolish the condition of slavery to which people of the Negro race had been subjected in the early days of the Nation. It is highly doubtful that the Court will ever be faced with another case of such obvious slavery. It is urged, however, that this does not mean that the Amendment is obsolete. It continues to stand as a guarantee against the degradation, debasement, and subjugation of the human being.

Petitioners' incarceration would unquestionably meet the strictest definition of involuntary servitude, in the absence of a governmental interest therein. Petitioners contend, however, that such interest is insufficient to expunge their incarceration of its character as involuntary servitude. Petitioners suffered more than the confiscation

of their persons and their liberty. They suffered deprivation of the livelihood and welfare for themselves and their families. They were stripped of the ability to sustain life itself. For them, the natural and probable consequence of the statute was to reduce them to the state of paupers. This is more than deprivation of liberty—it is degradation and debasement. The statute embodies and imposes utter disregard for human dignity and well-being. It operates to render incarcerated witnesses mere chattels, with which the government may do as it pleases. As such, it creates and requires the existence of one of the essential characteristics of slavery—disrespect for and degradation of human life. Surely, if the Thirteenth Amendment has meaning at all, it must mean that government may not rape human beings of their welfare and dignity in this manner.

It is therefore clear that the one element which may raise Petitioners' loss of liberty above the level of slavery is the payment of just compensation. In depriving Petitioners of such compensation, the statute violates the prohibition of involuntary servitude of the Thirteenth Amendment.

FOURTH POINT OF ERROR

IV.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT CORRECTLY DENIED PETITIONERS' REQUEST FOR A THREE-JUDGE COURT.

Argument and Authorities

Petitioners sued in the District Court, individually and as members of a class, to recover witness' fees alleged to be due to them in accordance with the provisions of 28 U.S.C. section 1821, and in the alternative, to enjoin the operation of that statute as repugnant to the Constitution, and for other relief. Petitioners requested the convening of a three-judge district court to hear the cause, in accordance with 28 U.S.C. section 2282, which provides that an injunction restraining the enforcement, operation or execution of any act of Congress may be granted only by a three-judge district court.

In obvious reliance upon the "Poresky doctrine", established in *Ex Parte Poresky*, 290 U.S. 30, 54 S.Ct. 3, 78 L.Ed. 152 (1933), the District Court denied Petitioners' application for a three-judge court, concluding that the pleadings failed to raise a substantial constitutional question.

The Court of Appeals affirmed this action of the District Court, invoking the "Poresky doctrine" and also concluding that the federal questions presented were insubstantial.

It is submitted that the "Poresky doctrine" has no application here. In *Ex Parte Poresky*, supra., it was held that where there is no diversity of citizenship jurisdiction,

and jurisdiction depends upon the existence of a substantial federal question, the single judge may determine the initial jurisdiction of the district court before calling for the convening of a three-judge court by making a determination as to whether or not the constitutional claim asserted is obviously without merit or its unsoundness clearly results from previous decisions of the Supreme Court. The Court made it clear that the doctrine is to operate only in those situations where the initial jurisdiction of the district court depends upon the existence of a substantial federal question, in the following language:

> " . . . the District Judge clearly has authority to dismiss for the want of jurisdiction when the question lacks the necessary substance *and no other ground of jurisdiction appears.*" 290 U.S. at p. 32. (emphasis supplied)

This is a perfectly logical decision. Where jurisdiction depends upon the existence of a federal question, neither the single judge nor a three-judge court will have jurisdiction if the claim of unconstitutionality of the statute is plainly insubstantial, and therefore the convening of a three-judge court can be appropriately avoided by permitting the single judge to make the initial determination as to the necessary substance of the federal question, and therefore as to jurisdiction. However, it is clear that the decision is not a sweeping grant of authority to the single judge to decide the merits of every case where a three-judge court is requested, and it is clear that where initial jurisdiction does not depend upon the existence of a federal question, the doctrine has no application.

In this case, Petitioners did not invoke the jurisdiction of the District Court based upon 28 U.S.C. section 1331,

the "federal question" statute, but rather they invoked jurisdiction upon 28 U.S.C. section 1346 (a) (2), as a claim for money against the United States. Insofar as initial jurisdiction did not depend upon the existence of a federal question, the doctrine has no application to the case.

It is recognized that decisions subsequent to *Poresky* have indiscriminately applied the doctrine of that case to all cases involving applications for a three-judge court. It is urged, however, that the *Poresky* decision clearly does not contemplate such a result, and its logic cannot be extended to those cases in which initial jurisdiction does not depend upon a federal question. Otherwise, the three-judge court statute is rendered meaningless.

In addition, the District Court here did not merely determine that it was without jurisdiction and dismiss the cause for want thereof; it proceeded to determine the merits of the case and render summary judgment for the Government. Whatever the meaning of the Poresky doctrine, it certainly does not authorize a single judge to hear, determine, and render judgment upon the merits.

Nevertheless, assuming that the District Court was authorized here to determine whether the constitutional questions involved are substantial, it is submitted that the determination made was erroneous.

Unless the constitutional questions involved are *plainly* insubstantial, as where a previous decision of this Court has decided the particular issue in the same context in favor of constitutionality, the district judge is powerless to decide the merits, and must convene a three-judge court. *Schneider v. Rusk*, 372 U.S. 224, 83 S.Ct. 621, 9 L.Ed.2d 695 (1963).

In this case, as has been illustrated hereinabove in the argument concerning the constitutional issues, those issues are not plainly insubstantial. Indeed, most of them are questions of first impression, and certainly no decision of this Court has squarely decided them. The Court of Appeals found it necessary to write an extensive opinion to support its conclusion that the questions are insubstantial, which, of itself, illustrates their substance.

For these reasons, the District Court erred in overruling Petitioners' application for a three-jjudge court, and the Court of Appeals erred in affirming that action.

CONCLUSION

For the reasons stated herein, Petitioners respectfully pray that this Honorable Court reverse the judgments of the United States Court of Appeals for the Fifth Circuit and the United States District Court for the Western District of Texas, El Paso Division, in this cause, and render judgment in favor of Petitioners as prayed for in their Complaint and Motion for Summary Judgment in the trial court; or, in the alternative, that the Court reverse said judgments and remand the cause for trial before a three-judge court; or, in the alternative, that the Court reverse said judgments and remand the cause for trial before a single judge.

Respectfully submitted,

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